# Vote "No (X)"

ON THE PROPOSAL (NO. 10)

"Amendment to Article Seven (7) of the Constitution Providing for the Recall of Public Officials"; to be Submitted at the Next General Election.

## First Prize Arguments

By Students of Minnesota Law Schools and High Schools

Against

## RECALL *of* JUDGES

*by*

HARVEY S. HOSHOUR of Duluth, Minnesota

*and*

ARTHUR O. LEE of Madison, Minnesota

(NOTE. In the November elections, since these arguments were published, the proposed Amendment was rejected; lacking about 40000 votes of the number necessary for its adoption.)

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## NOTE

During the past three years the American Bar Association through its Committee to Oppose Judicial Recall, of which the undersigned has been Chairman for over two years, has been working to bring home to the electorate of this State and of the entire Nation, the true significance of the Judicial Recall. The Recall, as applied to judges or to judicial decisions, is a proposition repugnant to our constitutional form of government. It is destructive of the judicial function. Its effect is to eliminate constitutional safeguards. It is in essence a Socialistic measure. It is anti-Republican. It is anti-Democratic. It is non-progressive.

The undersigned offered, last Spring, prizes to the high school and law school students of Minnesota for the best argument against the Recall Amendment (No. 10) which is to be voted on by the people of Minnesota in the coming November elections. This proposed amendment includes the recall of judges. The enclosed are the arguments prepared by Mr. Harvey S. Hoshour of Duluth, who won the first prize among the Law school contestants, and by Mr. Arthur O. Lee of Madison, who won the first prize among the high school contestants.

I can submit no better reasons than are here presented, for the rejection of the proposed recall amendment. These arguments not only present views with which I am in accord, but they show the conclusions of intelligent people who have studied the matter and who have come to those conclusions through intelligent consideration of the subject.

I commend these discussions to the earnest attention of the voters of Minnesota.

Respectfully submitted,

ROME G. BROWN.

Minneapolis, Minnesota, October 24, 1914.

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MAR 31 1915

## ARGUMENT BY HARVEY S. HOSHOUR

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## SUMMARY

I. Introduction.

a. In Minnesota, popular government is securely established due in a great measure to the prevalent spirit of public discussion on current topics.

b. The argument will be confined to the recall of judges alone, since they have different duties from administrative officers, and the same arguments do not apply to both.

c. Under the proposed amendment, since judicial and administrative officers are grouped together, the man who is opposed to the recall of judges must vote "no" on the whole amendment.

II. The Issues.

a. Is the recall of judges in line with our past policy? (III)

b. If not so in line, is such a change desirable?

(1) Is the recall fair to the judges? (V)

(2) What result will the recall have on the effectiveness of the law? (VI)

(3) What will the effect be on the public and its rights? (VII)

(4) Will the recall remedy existing defects? (VIII)

(5) Has it worked well where it has been tried? (IX)

(6) What are the opinions of careful observers on the question? (X)

III. Past Policy.

a. The recall is not in line with our past policy, as a state or nation, in that it makes the courts dependent on the will of the people.

IV. The Burden of Proof.

a. The burden of proof is upon those who propose such a change in our governmental policy—

(1) In that the test of our national and state experience supports the older form;

(2) In that the recall of judges is out of harmony with the Constitution.

V. The Recall is Unfair to the Judges.

a. In that the method of defense provided for is inadequate to give the judge a fair trial;
b. In that those who accuse the judge are also among those who decide concerning his guilt.

VI. The Recall will Minimize the Effect of the Law.

a. In that there will be a different rule in like cases;
b. In that more litigation will result.

VII. The Recall will have a Maleffect on the Public and its Rights.

a. In that the rights of the weaker party will be infringed;
b. In that the rights to life, liberty, property, and other constitutional guaranties will be jeopardized.

VIII. The Recall will not Remedy Existing Defects.

a. In that the same people who elect a corrupt judge will vote at his recall, and also for his successor;
b. The remedy of impeachment, properly regulated, is more effective than the recall in removing corrupt judges.
c. The recall will not remedy the delay and technicality in our law.

IX. The Recall has been a Failure in Practice.

a. It has failed in foreign countries in the past.
b. It was part of the Articles of Confederation, and was purposely omitted from the Constitution.
c. It has been a failure in the western states which have recently adopted it—
   (1) In that it has introduced bad practices in soliciting names for the petition;
   (2) In that it has failed to interest a representative proportion of the people.
   (3) In that it has introduced party politics into the judiciary.

X. Opinions.

a. The opinion of representative men who have made a study of governmental duties, is opposed to the recall of judges.

## ARGUMENT

We, who live in Minnesota, believe in a government that places the power in the people; and we believe that this power should be just as close to the people, in every case, as is practicable and expedient. It is not by chance that Minnesota laws are among the most progressive in America; it is not by chance that such measures as the election of senators by popular vote, woman suffrage, and the initiative and referendum have made great forward movements here; nor is it by chance that Minnesota is the first state, having any of its territory east of the Mississippi, to vote on the recall of public officials.

That popular government is so securely established in Minnesota, is due—if to one thing more than another—to the prevalence throughout the state of discussion concerning questions of public interest. In the hope of helping in some measure in the discussion of the recall, now at issue, this article is written.

The writer's position on the recall is summarily stated by President Wilson:

> "The recall is a means of administrative control. If properly regulated and devised, it is a means of restoring to administrative officials, what the initiative and referendum restore to legislators, namely, a sense of direct responsibility to the people who chose them. The recall of judges is another matter. Judges are not law-makers. They are not administrators. Their duty is not to determine what the law shall be, but to determine what the law is. Their independence, their sense of dignity and of freedom is of first consequence to the stability of the state. To apply to them the principle of the recall is to set up the idea that the determinations of what the law is must respond to popular impulse and to popular judgment. It is sufficient that the people should have the power to change the law when they will. It is not necessary that they should directly influence by threat of recall those who merely interpret the law already established."

The argument, therefore, will be confined to the recall of judges, all of whom are included in the provisions of the proposed amendment. It is unfortunate that administrative and judicial officers are included together; but, if the people of Minnesota want a recall of legislative and executive officers,

such a measure can be proposed and voted on at another time. As the question will be presented at this election, every one who is opposed to the recall of judges, to make his vote effective, must vote "no" on the proposed amendment.

The question naturally resolves itself into two main issues. The first of these is: Is the recall in line with our past policy? The second: If it is not so in line, is such a change desirable? The second of these issues is the more important to the believer in popular government, though the first is by no means negligible in its effect on the decision of the thoughtful citizen. The second division of the question raises such component issues as: (1) Is the recall fair to the judges, in view of their duties and position? (2) What effect will the recall have on the stability and effectiveness of the law? (3) What effect will it have on the public rights? (4) Will the recall of our judges remedy existing defects in our law and courts? (5) Has the proposed plan worked well in other places? (6) What is the opinion of fair-minded and able observers on the question? I shall consider the issues raised by these questions in the order given, stating them positively rather than in the interrogative form.

## THE RECALL OF JUDGES IS NOT IN LINE WITH OUR PAST POLICY

That the recall of judges is not in line with our past policy as a state and nation seems self-evident. Since the Constitution was adopted, it has been our policy to keep the judiciary independent of every external force, whether that force be popular will or executive control. The chief argument brought forward by the advocates of the recall, is that it will make the courts responsive to the people's wishes. That this is a decisive change in our past policy is indisputable, nor is the contrary argued by the proponents of the recall.

## THE BURDEN OF PROOF

The issue then arises: Is such a change desirable? No thinking American will scoff at the wisdom of the men who formed our Constitution, that document characterized by Gladstone as "the most wonderful work ever struck off at a given time by the brain and purpose of man;" but, on the other hand, he will not accept any theory or practice of government,

as applied to our conditions today, simply because our fathers thought it best. He will consider all the facts, weighing heavily the opinions of those who formed our Constitution, in that it has stood the test of years. The words of Abraham Lincoln are applicable here:

> "I do not mean to say that we are bound to follow implicitly in whatever our fathers did. To do so would be to discard all the lights of current experience—to reject all progress, all improvement. What I do say is that if we would supplant the opinion and policy of our fathers in any case, we should do so upon evidence so conclusive and argument so clear, that even their great authority, fairly considered and weighed, cannot stand."

The burden of proof rests then upon those who propose the recall.

### THE RECALL IS UNFAIR TO THE JUDGES

Fairness is a thing on which we as Americans pride ourselves. To consider any question from the stand-point of those most affected is essentially American, and, to the thinking man, it is fundamentally essential.

The recall, as stated in the proposed amendment, does not give the judge a fair trial. In any important case the evidence and rulings of the court, upon which a recall could be based, will cover a number of volumes, and frequently intricate questions of law and fact will be involved. How can the voter determine, from a 200 word charge and a 200 word defense, whether or not the issues in such a case were correctly decided, and make that determination fair to the judge? How can the voter decide fairly, whether or not the court rightly interpreted the law, when the case may involve a hundred points and the authorities, on which the decision rests, may run back a hundred years? The question cannot be whether or not the law is wrong—over that the judge has no possible control—but only whether there was a correct interpretation of the existing law. Obviously it is unfair to take the newspaper reports of the case or what political speakers may say. A fair decision in the case of a recall of a judge, should involve a study of how learned and unprejudiced judges have interpreted the same or similar laws in the past, in this and other jurisdictions. How can all this be included in 200 words, so as to be fair to the judges?

Again, the judge is not treated fairly, in that his accusers form part of the jury. In our actions at law we exclude all those as jurors, who have even a remote interest in the litigation; but, under the proposed system, the judge is to be tried by a jury, 20% of whom have gone on record as being opposed to him, by signing the recall petition, and that too, without having heard the judge's side of the question. Is this fair to the judge? Are not our judges—even when they are on trial—to be given as fair a chance as the criminals who come before them?

## THE RECALL WILL MINIMIZE THE EFFECT OF THE LAW

It is axiomatic that the civilization of a nation increases in direct proportion as the people of that nation have effective laws. A government without such laws is but a form of anarchy. It is not the duty of the court to make the laws, but only to interpret and declare them, and to make that declaration uniform in like cases, thus giving the laws stability and effectiveness. It requires no evidence to prove that a law applied differently in every case will have no stability nor efficiency; indeed it will not be a law at all. If the judge is subject to a recall, he cannot help but think more of what the people will think of his decision, than of the efficiency of the law. This will tend to bring about a different rule in every case; litigation will be increased, in that many suits will be started, which, if the law were settled, would never have been brought. The law will tend to become unstable, unsettled and ineffective.

## THE RECALL WILL HAVE A MALEFFECT ON THE PUBLIC AND THE RIGHTS OF THE PEOPLE

Edmund Burke said:

> "The poorest being that crawls on earth contending to save itself from injustice and oppression is an object respectable in the eyes of God and man."

That, in essence, is the basis of our constitutional government. Here the rights of the poorest subject are above the power of any force to alter. If the proponent of the recall of judges wants an unanswerable reason why the judiciary must be independent, if the rights of the people are to be preserved,

let him think of the application of the above quotation to the plan he is advocating.

If the courts are not wholly independent, who is to protect the man who is contending for his rights against heavy odds? If an individual is suing, in a case where the supposed desires of the majority of the people are opposed to him, how can he get a fair trial? This squarely raises the question: Can a man have any rights, which a majority of those who vote at a recall election, think he should not have? That, indeed, is the crux of the whole situation. The man who believes that there can be no such rights—and only he—can consistently vote for the recall of judges.

Under our Constitution there are some things that no majority, however great, can change. Such are the right to the writ of *habeas corpus*, the prohibition against the passing of *ex post facto* laws, the right to be secure in life, liberty and property, and many other rights known to every American. To make the question personal and concrete, are you willing that your property rights, your liberty, your life, should be at the will of the majority of those who vote at a special election? In every case, on which a recall could be based, someone's rights—frequently someone's life—are at issue. The courts alone can protect these rights. If you make them dependent on a popular majority, then the rights that our fathers fought to attain are lessened and potentially gone, as the majority changes.

The words of Senator Root are applicable here. The recall of judges, he says,

> "abandons absolutely the conception of a justice that is above majorities, of a right in the weak which the strong are bound to respect. It denies the vital truth taught by religion, and realized in the hard experience of mankind, and which has inspired every constitution America has produced, and every great declaration for human freedom since Magna Charta,—the truth that human nature needs to distrust its own impulses and passions, and to establish for its own control the restraining and guiding influences of declared principles of action."

## THE RECALL WILL NOT REMEDY EXISTING DEFECTS

In Minnesota there is little charge of corruption in the courts; our Supreme Court is said to be the most progressive state tribunal in America; the judges of our lesser courts are

men of eminence and dignity in every community. This raises the question: Why a recall with its incident dangers? But, granting that there is corruption in our courts, such corruption will not be remedied by the proposed system.

In the first place, if the people elect a corrupt and inefficient judge, the same people will vote at the recall, and again when a successor is elected. If the people are incapable of electing a fair judge, it is unreasonable to think that the same people will be able to vote rationally at a recall election, where the issues are sure to be much more involved. The same methods will apply in each election; the same parties will control and the same bosses, who put the corrupt judge in office, will replace him with another quite as corrupt and even more cringing to the will of his masters.

If the judge becomes corrupt after his election, no recall is needed, for we already have the remedy of impeachment. If impeachment is not workable now, its plan and form can and should be changed, so as to make it more easy of application. The difference between the recall and impeachment is, that in the latter case the judge is tried in accordance with the rules of evidence, and by those who have an opportunity fully to investigate the charges; whereas in the recall, the judge is tried by those, who in the nature of the case cannot have had a chance to learn all the facts, and by a group, 20% of whom are avowedly his opponents. In impeachment, the judge is given the sort of a trial that a criminal gets under our law, no more, no less. Regardless of fairness to the judges, which is the more effective to remove the really corrupt and inefficient judge?

Nor would the recall remedy the delay and technicality that exist in our law to-day. No particular judge is or can be responsible for these things, and the recall of any judge for such reasons, will not change them one whit. If there is too much delay, our procedure should be changed; if there is too much technicality, less technical laws should be made, not by the judges—who have no such power—but by the legislature.

## THE RECALL HAS FAILED WHERE IT HAS BEEN TRIED

The idea of a recall of judges is no new thing. The judges of Babylon, four thousand years ago, were subject to a recall by the king; in ancient Greece, the people had the power of recall; in England, prior to the Act of Settlement, the king

had such a power; in France, during the Revolution there, such power was in the people. Every student of history knows the result in these cases. Babylon is of interest only to show what government should not be; the pure democracy of ancient Greece caused its downfall; the system in England produced a Jeffreys, made possible the Bloody Assizes and cost a king his crown; and in France the Reign of Terror was the result.

In America, the recall was part of the Articles of Confederation, and on the failure of the government under those articles, the recall was omitted from the new plan of government, though not without some opposition.

Since 1908, Oregon, California, Arizona, Colorado and Nevada, have adopted the judicial recall. Three things are significant in a study of the recall in these states:

(1) It has introduced bad practices in procuring names for the recall petitions.

(2) The recall elections have failed to interest a representative portion of the people.

(3) It has introduced party politics into the question.

I shall consider these three points briefly.

(1) Allen H. Eaton, in his book, "The Oregon System," says that the attempted recall of Judge Coke, in Oregon, failed because of the lack of funds to procure enough signatures to the petition. Fred W. Catlett, in the Annals of the American Academy, says:

> "As it actually worked, petitions are placed in the hands of many irresponsible persons, who indiscriminately solicit signatures on the streets and in the office buildings, ignorant in the great majority of cases, not only of the voting qualifications of the signer, but also of the genuineness of the name and signature."

(2) When Judge Weller was recalled in California, a case where the enthusiasm was at white heat, the total vote was less than 50% of the qualified list of voters, and he was recalled by a vote of less than one-fourth of the qualified voters. This means one of two things; the voters were not interested in the question, or they failed to vote because they found it impossible to make a rational decision.

(3) Mr. Gilbertson, a secretary of the New York Short Ballot League, says, in the Annals of the American Academy, that politics have been the leading issue in every case of the recall that has been tried.

## AN INSTRUMENT OF SOCIALISM

The Socialist party has already incorporated the recall of judges into their national platform. In the words of Mr. Debs' paper, "The Appeal to Reason," it is "the means whereby the people will be enabled to inaugurate Socialism." The same publication, before the notorious McNamara trial, said,

> "Under the provisions of the recall amendment, the judges of the Supreme Court of California can be retired. These are men who will decide the fate of the kidnapped workers. Don't you see what it means, comrades, to have in the hands of an intelligent, militant, working class, the political power to recall the present capitalist judges, and put on the bench our own men? Was there ever such an opportunity for effective work? No; not since Socialism first raised its crimson banner on the shores of Morgan's country."

A news item, taken from the "Duluth Labor World" of August 8th last, illustrates the same point:

> "The Socialists' local here has called to its aid the entire Socialist party of the state and nation. The first to respond is the Appeal to Reason, with its over one-half million circulation, pledging itself without reserve, to continue in the recall fight, until Judge McHendrie is swept from the bench and Bob Uhlich freed from jail. A special representative of the Appeal is now in Trinidad."

That these things should arise was inevitable; that they have come up is but proof of the correctness of my thesis. Are we, in Minnesota, willing that such methods of soliciting be introduced? Are we willing that our judges should be recalled by one-fourth of the voters? Are we willing to have the Socialists, or any other political party, make the recall of our judges a national issue? Are we willing that political papers in other states, should pledge themselves to sweep our judges from the bench? If the experience of other states it to be taken as a criterion, the man who casts his vote in favor of this measure, must answer each of these questions in the affirmative.

## THE OPINIONS OF COMPETENT OBSERVERS ARE OPPOSED TO THE RECALL OF JUDGES

Opinions on such a question are only of value, when those who give them have had experience in governmental matters. So far as I have been able to find, no man of national prominence has come out squarely in favor of the recall of judges. I have already referred to the opinion of Woodrow Wilson, the great leader of the majority party, as well as to Senator Root the leading figure of the minority party. Mr. Borah, the famous progressive Senator from Idaho, says: "It is my deliberate and uncompromising opinion that without a free, untrammeled, independent judiciary, popular government, the government of the people, by the people, and for the people, would be a delusion, a taunting, tormenting delusion."

Space will allow the quoting of but one other man, the venerable Archbishop Ireland of Minnesota: "No greater peril to the institutions of democracy, to the permanency of social order, could well be imagined, than the legalizing of the recall of the judiciary."

## CONCLUSION

The conclusion of the matter may be stated briefly: (1) The recall of judges is a radical change in our past policy: (2) Such a change is not desirable; (a) Because it is unfair to the judges; (b) Because it will make our laws ineffective: (c) Because it will have a devastating effect on the rights of the people; (d) Because it cannot remedy any existing defects; (e) Because it has failed where it has been tried; (f) Because the opinion of capable and experienced observers is opposed to the recall of judges.

Men of Minnesota before you cast your votes in favor of this measure, *think on these things.*

HARVEY S. HOSHOUR.

## ARGUMENT BY ARTHUR O. LEE

Of the Madison High School
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A determined and widespread attack is being made upon the old and established order of things political. It is asserted that we have outgrown our constitution; that government is not sufficiently direct and responsive; that our courts are usurping legislative powers; that they are abusing their high offices in the interests of special privilege, and that justice is being delayed.

The popular unrest that has arisen has received its proportions, not so much from the nature of the conditions calculated to produce it as from the contagion produced among the impressionable populace by the Socialists and the so-called progressives, who, with their radical ideas of democracy, are traversing the states of our nation, fascinating and enchaining the imagination of the people with a hue and cry about "popular government." The idea of "direct government." "popular control" and the rest of the catch phrases of the propaganda of so-called progressivism are alluring to the average everyday citizen who has neither the time, the inclination nor the capacity to make more than a superficial analysis of what it means and embodies.

The recall epidemic has reached Minnesota, and a constitutional amendment is up for approval or rejection, as the voters of this state see fit, providing for the recall of all public officials, elective and appointive. This includes judges. It is urged by the "progressives" who brought the proposal into prominence that we need more direct and responsive government, and that in view of the abuses in our judiciary the people should exercise a direct restraint upon the actions of the judges. In short, the underlying purpose is to control, by the arbitrary exercise of the popular will at recall elections, the acts and tenure of public officials, including the judiciary.

Those who advocate the recall attempt to justify the adoption of such a proposal by citing cases of delayed justice, drawn out litigations and usurpation of legislative functions by the judiciary.

## RECALL NO REMEDY

As to delayed justice, long litigations and technical imperfections in our judicial system, no one can consistently claim that the exercise of the recall would tend to ameliorate these conditions. In fact, it was not originally proposed in order to meet these difficulties. However, it is claimed that we need to exercise a check upon judges who frequently usurp powers, not properly theirs, to declare laws unconstitutional. This, with the argument for a direct democracy, is advanced as a principal reason why the state of Minnesota should incorporate into its constitution the provision for the recall of public officials, including judges.

It is claimed that the courts have overstepped their authority by assuming to declare laws unconstitutional. But what is the limit of the authority of a court in a case where a law is seen in fact to be void and unconstitutional? American courts, since the beginning, have claimed this duty as a proper function under our constitutional system. Professor Thayer of Harvard, in his constitutional discussions, proves that when the judiciary declares an act repugnant to the organic law it is acting in its proper sphere. In fact this function of the judiciary has become an essential feature of our governmental system. This, then, is not usurpation, much less does it constitute a ground for adopting the recall.

When the exponents of the recall, in trying to justify their proposal, attempt to show that the judges in the good state of Minnesota are corrupt and inefficient, they miserably fail to present an argument. The judiciary of Minnesota has always presented and gives assurance of presenting to its citizens a class of the most honorable and patriotic-spirited men in the profession. Our courts thus far have been above reproach and the criticism directed against their honesty and integrity stands unsubstantiated.

## "A RETROGRESSIVE STEP"

There is not one consistent reason why Minnesota should make the recall a part of the organic law of the state. It is not a constructive step. It is reactionary and retrogressive, a step back to the dark ages of government.

Analyzed to its logical conclusion the adoption of the recall means that our representative form of government is to be

substituted by a direct or an unlimited democracy. No proposition could strike more directly at the heart of representative government. We are told that representative government, which is the one great political bequest from the growing development of the progressive nations of the world, has failed. We are urged in the name of "progress" to adopt the instruments of socialism, including the recall, in order that our government shall become more direct and responsive. But direct democracy is nothing new. It existed in cultured Athens and in civilized Rome. It prevailed in bloody France. The history of these nations is an instructive memory. In them direct government by the numerical majority failed. In them the ideal theory was shattered. And they had the initiative, the referendum and the recall democracy.

Ostracism in Athens operated on the same principle as does the recall. There is no essential difference between the form of those old time governments that have failed and the form now proposed. Those who uphold the recall argue that times have changed, that conditions are different and that what applied to those past nations could present no lesson to us. But, while we admit that great changes have crept over our civilization, we emphatically deny that fundamental principles and governmental axioms have materially changed. Human nature is the same to-day as it was in Greece and France. Conditions change, ingrained principles and human nature endure.

## DESTROYS OUR FORM OF GOVERNMENT

Do men realize that by instituting a direct vote on the political and economic questions confronting the judiciary in our complex American life they are casting the established idea of representative government on the rubbish heap and taking from the same rubbish heap the discarded and cast-off principle of direct and unlimited democracy? Why should we disregard historical illustration when the political history of the world shows that where pure democracy has failed representative government has succeeded on its ruins? The men who framed our splendid constitution considered the different forms of government, including direct democracy, and decided in favor of representative government, which, under our constitutional system, has become the model of the world.

Then why should we change our form of government? Are we justified in bequeathing to posterity a system of government inferior to that which we have inherited and hold in

sacred trust? When conditions do not and cannot warrant a radical change, have we the moral right to undo in a single stroke the finished product of 500 years of Anglo-Saxon development of the idea of representative government?

Now, let us test the proposition of popular recall in the light of a few fundamental principles. There are certain inalienable rights which inhere in free government and which are recognized in all constitutions. Among these rights there is none more important than this—that no citizen shall be deprived of his liberty or property except by the judgment of the law and after a trial before an independent and impartial tribunal. This is the keystone of the arch. The majority of the legal voters cannot constitute itself such tribunal. If it does, there is no sure or stable protection for the rights of any individual or of any minority.

## ESTABLISHES A TYRANNY OF MAJORITIES

Most common among the class of cases that come up before the law are those in which one of the parties is in fact, if not in name, the people themselves or the temporarily popular majority. It is generally contended in these cases that some fundamental right of the individual or of the minority is being violated. In such cases how is the independence of the tribunal which is dependent upon one of the contracting parties to be maintained? Take a common case. A popular majority, through the legislatures elected by it, enacts a statute requiring railroads to carry passengers for 2 cents a mile, or say, 2 cents for 10 miles. In the test case that comes before the court the railroad claims that the act robs it of its property. The court after hearing and study of the facts, sustains this claim. being dissatisfied with the decision, the popular majority recalls the judges who gave the decision and elects judges who will reverse the decision. Which is the determining power? Is it not the popular majority which has constituted itself the court in its own case?

Let us examine the recall in the light of another fundamental principle. When the same power which enacts a law also decides whether the particular case comes within that law, we call it a despotism. There is no separation of powers and functions. On the other hand, in a free government one body makes the law, while another body decides whether the particular case comes within the law. Thus the citizen is protected, because the legislative and judicial departments are kept sep-

arate. Now, if the popular majority not only makes the law, but also decides whether a given case falls within it, then the legislative and judicial powers are united. The government then ceases to be free. It is a despotism, the despotic tyranny of popular majorities.

## DESTROYS JUDICIAL FUNCTIONS AND PROMOTES SOCIALISM

Not only is the judicial recall wrong in principle, but its effect would be to destroy the independence of the judiciary and, in the last analysis, to destroy the functions of the judiciary itself. The real progressive tendency during the last half century has been to build up an independent, untrammeled judiciary, recognizing no master, catering to no party or faction and administering justice according to law. But the recall proposition is a direct blow at this progressive development of an independent judiciary.

Basing their argument on the assumption that the judge is an agent or servant of the people, the opposition reach the conclusion that the people have the privilege of recalling their agent when he fails to satisfy the popular majority. The fallacy in the argument is in the assumption that the judge is an agent of the people. He is not an "agent" in any sense of the word. The peculiar character of the judicial office makes it imperative that he exercise his functions impartially, recognizing no constituency whatever, except, as Marshall said, "his conscience and his God." To make the judge dependent upon the public in a case in which the public is a party is to make the judge dependent upon the will of one of the parties upon whose claim he is to pass judgment. No sane man would be willing to have judgment passed upon him under such circumstances. It is precisely this state of affairs which it is the main object of the Socialists to bring about. They would have the majority pass statutes confiscating private property and, by the judicial recall, allow the same majority to coerce the courts into allowing such statutes to be enforced. They would eliminate private property by eliminating the present power of the courts to protect it.

## IT DEBASES JUDICIAL STANDARDS

The effect of the recall upon the personnel and character of the judiciary would be anything but salutary. By the very nature of things the recall will, and necessarily must, lower the judicial standard. Claiming that the impeachment process is too cumbersome, those who advocate the recall urge that the people should be given the power to remove inefficient or corrupt judges and elect better judges. But the feasibility of this is questionable. What constitutes inefficiency or incompetency? Can you expect a defeated litigant to judge judicial capacity fairly? Is it rational to attempt to determine the legal and constitutional correctness of a judgment by popular vote? Would it not be considered irrational to have the competency of a physician passed upon by popular vote? The electorate, especially in a case of a supreme judge, would be uninformed concerning the character of a certain judge charged by a few with incompetency. How, except by an extended campaign of education costing thousands of dollars, which corporations and special interests only could afford, could the character of a judge be determined? Then what reason is there to suppose that the electorate will do better concerning the selection of the second judge? Remember that the same power which created the bad judge in the first place is creating the next one. Is that body, to which the demagogues subtly refer as the "people" infallible?

Consider the question of corruption charged against a judge. Is it justice to have his honesty determined upon by popular vote after a heated campaign in which stump orators and demagogues have vied with one another in presenting trumped-up charges and exaggerated statements villifying the character of a judge? How will the judge single-handedly combat these agitators and attend to his judicial duties at the same time?

The indignity and disrespect to which our judges will be made subject under the threat and operation of the recall will work disaster on the personnel of our judiciary. What successful lawyer will leave his practice to hold an uncertain and discredited office? What class of judges will such a state of affairs tend to produce? Does it stand to reason that the threat of recall, hanging over the head of a judge like a sword of Damocles, will make him a better judge? Will men who possess true judicial caliber consent to being coddled into accepting an office whose tenure is controlled by fluctuating popular majorities?

## JUDICIARY MUST BE INDEPENDENT

Hamilton, Madison and Marshall said that the complete independence of the judiciary was absolutely essential under our form of government. In order to perform its high function the judiciary must be independent of the legislative power no less than of the power of popular majorities. To fuse the judicial and legislative functions is to destroy that separateness which was intended to exist between the three departments of government. To make the judge the tool of temporary popular majority, compelling him upon threat of recall to obey every changing whim and caprice of public opinion, is to make him, not the exponent of what the law is, but of what the people, for the time being, think they want it to be. Under such a regime we shall have a government of men, not a government of laws.

But the insidious and undermining influence of the recall does not end here. The duty of the judiciary is to protect constitutional safeguards, to secure the rights of individuals and minorities, however small. A judge, held in jeopardy by threat of arbitrary recall, cannot by the very nature of things exercise this function independently, fearlessly or impartially. He has got to look to the wishes of the faction which has made possible his election. If he disregards their mandates, this faction will, by employing the recall, proceed to replace the inflexible judge with a pliant reed, dependent upon their commands. When such a state of affairs comes to exist, as it unavoidably must under the recall, the people of Minnesota, must expect the nullification of constitutional protection through the destruction of the independence of the judiciary.

By constitutional safeguards we mean those liberties and established rights which inhere in free government. The first ten Amendments embody these rights almost in their entirety. They are written into the fundamental law of our land and are the distinguishing feature of our constitution written as they are in the shape of definite constitutional provisions insuring to every citizen the right of life, liberty, property and human happiness. These limitations upon the governing power have made our government the scientific basis of the constitutions of the world. These are the limitations which by reason of the recall agitation are being seriously threatened at the present time. The citizen who really understands that the adoption of the recall will directly, through the destruction of the independence of the judiciary, and indirectly, through the

nullification of constitutional safeguards, work against the basic principles of true government, will never be found placing his mark of approval opposite the proposed amendment.

## THOROUGHLY IMPRACTICABLE

But there are further objections to this boasted cure-all, the popular recall. Its impracticability alone must prohibit it from ever becoming a workable instrument. The expense of getting petitions signed, of conducting a campaign of education regarding the qualifications of a certain judge and the outlay connected with recall election must necessarily be immoderately great, especially so in the case of a supreme court judge. The middle class, which usually bears the brunt of such burdens, will not be able to exercise the use of the recall. Rather, you will find it will be the rich, influential litigants defeated in court trials, corporation-owned and controlled presses, special privilege interests and other self-serving elements, that will have the means and the influences to bring about the recall of a judge who dares to act without consulting their wishes.

If there ever was such a thing as bribery and corruption we shall have it in the judiciary if the tenure of that body is to be controlled by those who are financially the most powerful and influential. A campaign of slander, misrepresentation and vilification can be carried against a judge by powerful interests and the retention of a fair, impartial judge will be next to an impossibility. The recall is not an instrument designed to be employed by the forces of democracy. It is, rather, an instrument whereby plutocracy and wealth, hiding behind the protection of the recall, can perpetrate crimes darker than any which ever stained the history of the judiciary.

## CONCLUSION

Voters of Minnesota, this is the recall and such its meaning. If you vote for the recall amendment you have got to take all that goes with it. Remember that the recall is not a panacea for the technical imperfection in our judiciary. Remember that it means the overthrowing of representative government and the substitution for it of direct and unlimited democracy. Remember that it means the destruction of the independence of our judiciary and of the judicial department itself. Remember that, through the destruction of the independence of the judi-

ciary, it means the nullification of constitutional safeguards, thus establishing socialism, menacing every right of property and of liberty which you now cherish, menacing even your very existence. Remember that it is impracticable and unworkable, a two-edged sword, destructive of the judiciary and destructive of the interests of the people. Remember that it is fundamentally and totally reactionary, subversive of all true government and repugnant to all the fundamental principles for which civilized man since the signing of Magna Charta has fought.

ARTHUR O. LEE.

Extract from Annual Address of President Wm. H. Taft of the American Bar Association, delivered at Washington, D. C., October 20, 1914.

"This Association four years ago appointed a Special Committee to Oppose the Judicial Recall, and that committee has done great work. Its present chairman, Mr. Rome G. Brown, of the Minneapolis Bar, has delivered effective addresses to many State Bar Associations throughout the country, and has encouraged legislative opposition in many states to the embodiment of these heresies in statutes. The report of the committee shows that there has been a distinct falling off in the support of these fundamentally unwise and dangerous proposals. They were incorporated in the platform of the Progressive party, and the leader of that party at one time felt called upon to declare that they were the rock upon which it was founded and were essential to the efficacy of every other one of the reforms which the platform of the party set forth and advocated. It would appear that the party which once fathered these proposals now finds that instead of being the rock on which it is founded, it is, to change the metaphor, the rock on which it founders. Certainly it seems wise to its leaders to ignore this part of their original propaganda, an indication that it has ceased to be vote-getting and indeed has become a burden to any party that assumes to press it. I do not mean to say that the denunciation of the courts has not continued to be a favorite theme in the mouths of a certain class of orators, but the originators of this preposterous nostrum of judicial recall are engaged in scaling it down into changes in our judicial system which are not to be commended but which are much less radical and objectionable. In New York the Progressive party has abandoned its platform altogether and confined its appeal to the voters to a declaration against boss rule; while its candidate for Governor has rejected the recall. In Massachusetts, too, such methods of reforming the judiciary are not made the subject of discussion at all by the Progressive party, and its evident effort is to induce the voters to ignore them. The demon Rum has there been substituted as the object of attack, instead of "the divine right of fossilized judges," and of this change, whatever our views of prohibition, we can express our unqualified approval. The only state in which the recall of judicial decisions has been adopted is the State of Colorado, and the present condition of that state with reference to governmental authority is not such as to commend those who have formulated its policies in the recent past."

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